

BUREAU OF LAND MANAGEMENT

v.

ROSS BABCOCK

IBLA 77-197

Decided September 15, 1977

Appeal from the decision of Administrative Law Judge Michael L. Morehouse directing appellant to pay damages for grazing trespass. IDAHO 030-76-3003(SC).

Affirmed as modified.

1. Grazing Permits and Licenses: Trespass--Trespass: Generally

One who grazes livestock in a grazing allotment without authorization prior to the issuance of a license commits a grazing trespass.

2. Grazing Permits and Licenses: Trespass--Trespass: Measure of Damages

Under existing regulations, where a grazing trespass is not clearly willful, damages are to be computed at the rate of \$2 per AUM of federal forage consumed or the commercial rate, whichever is greater.

3. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Trespass--Trespass: Generally

Where there is a final administrative determination of the assessment of damages for a grazing trespass by a licensee, no license or permit should thereafter be issued or renewed until payment of the assessed amount.

4. Administrative Procedure: Burden of Proof--Administrative Procedure: Decisions--Administrative Procedure: Hearings--Administrative Procedure: Substantial Evidence--Evidence: Burden of Proof--Evidence: Sufficiency--Hearings--Rules of Practice: Evidence

After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence. Because a grazing trespass proceeding is not a criminal proceeding, it need not be proved beyond a reasonable doubt that a particular individual committed the trespass.

5. Evidence: Generally--Grazing Permits and Licenses: Trespass--Rules of Practice: Evidence--Trespass: Measure of Damages

When 33 percent of the available forage in a grazing allotment is on federal land and the remainder is on private land, it is appropriate to find that 33 percent of the forage consumed by cattle throughout the allotment was federal forage, in the absence of evidence to the contrary.

6. Administrative Authority: Generally--Constitutional Law: Generally--Grazing Permits and Licenses: Trespass--Secretary of the Interior--Trespass: Generally

Pursuant to the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, Congress has enacted the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970), and other statutory authority which empower the Secretary of the Interior to define what conduct constitutes a grazing trespass and to determine whether or not an individual has committed a trespass.

7. Administrative Procedure: Hearings--Constitutional Law: Generally--Grazing Permits and Licenses: Trespass--Hearings--Rules of Practice: Hearings--Trespass: Generally

There is no constitutional right to a jury trial in an administrative proceeding such as a grazing trespass hearing.

8. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Hearings--Constitutional Law: Generally--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Trespass--Hearings--Rules of Practice: Hearings

Administrative hearings required in grazing trespass cases are not an unlawful exercise of judicial power and meet constitutional requirements and the standards of the Administrative Procedure Act. The constitutional requirement of due process is not violated merely because an Administrative Law Judge is employed by the Department of the Interior.

9. Administrative Authority: Generally--Constitutional Law: Generally--Grazing Permits and Licenses: Generally--Public Lands: Generally--Secretary of the Interior--State Laws

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, federal laws, including federal grazing regulations, override conflicting state laws with respect to public lands.

10. Accounts: Payments--Contracts: Performance or Default: Release and Settlement--Grazing Permits and Licenses: Trespass--Trespass: Generally

Where cattle are admitted to an allotment at the beginning of the usual grazing season but prior to the issuance of a license for that season, and payment is later made by a check which recites that it is "payment in full for 1975 grazing fee," the Bureau of Land Management may properly deposit the check, allotting part of the proceeds for the grazing license for the rest of the season, and deposit the remainder of the proceeds in a suspense account pending resolution of the trespass. Such action indicates that the check was not accepted in settlement of the trespass damages, and cashing the check does not constitute an accord and satisfaction of the trespass damages.

APPEARANCES: Ross Babcock and Lawrence Babcock, Moore, Idaho, for appellant; Robert S. Burr, Esq., Boise Field Office, Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal from the January 19, 1977, decision of Administrative Law Judge Michael L. Morehouse, directing the appellant, Ross Babcock, to pay \$149 as additional payment for grazing cattle on the Beck Canyon Allotment before a grazing license was issued. The total amount in damages was determined to be \$225, but

a \$76 credit was allowed because appellant had made an overpayment in that amount for the license when it was finally issued. Throughout these proceedings, Ross Babcock has been represented by his son, Lawrence, who assists his father in his business.

The Beck Canyon Allotment consists of private and federal lands. No fences separate the private land from the federal land within the allotment, although the allotment itself is separated from the surrounding land by fences and natural barriers. It appears that appellant has been obtaining annual licenses for grazing in the allotment pursuant to a 1958 range adjudication. Judge Morehouse summarized the facts in this case as follows:

Respondent's usual license is for 85 cattle from May 1 through October 15 and, in his application dated October 23, 1974, he applied for this use for the grazing year 1975 (Govt. Ex. 2). BLM went on a system of computerized billing notices for the first time in 1975 and this computerized billing notice was mailed to the Babcocks in late March or early April 1975. It had on it information concerning nonuse and suspended nonuse AUM's that had not been contained on previous billing notices although the number of active AUM's remained the same. It also had on it the statement to the effect that grazing on Federal range without authorization was prohibited and unauthorized grazing would be deemed to be in trespass. This notice was not paid and a subsequent notice was forwarded on May 16, 1975. A further notice was forwarded on May 28, 1975, again requesting payment and stating further that if payment was not made within 15 days the billing would be cancelled. On June 11, 1975, a letter dated June 9 was received from Ross Babcock stating that he would pay the grazing fee but there were a number of discrepancies regarding his grazing rights in the Beck Canyon Allotment which needed resolution and he requested that a meeting be scheduled for that purpose. Shortly thereafter a letter was sent

to Mr. Babcock arranging a meeting for June 20, 1975, however, this was postponed at the request of Mr. Reid J. Bowen, attorney for the Babcocks.

The conference was then rescheduled for July 21, 1975. In the meantime, the billing was cancelled for nonpayment. On July 9, 1975, the district manager and area manager made a trip to the Beck Canyon Allotment and observed 25 Babcock cattle grazing in the allotment. On July 10, 1975, a trespass notice was forwarded to Mr. Babcock advising him his livestock were in trespass. On July 21, 1975, a meeting took place between the district manager, the area manager, and the Babcocks. At this meeting, various issues in dispute concerning the allotment were discussed and, in addition, the Babcocks advised that they had turned out approximately 80 head of cattle onto the allotment on May 25, 1975. The Babcocks were advised at that time that they should pay their grazing fee for the balance of the season but they would be considered in trespass from May 25 up to the date of receipt of payment of the grazing fee. On July 22, 1975, a check was received from the Babcocks for \$155.00, the amount of the grazing fee for the full year, and on the check was written "payment in full for 1975 grazing fee." This check was cashed by BLM and the financial clerk was instructed by the area manager to credit \$79.00 toward payment of the grazing fees from July 22 through October 15 and to put the remaining \$76.00 in a suspense account pending resolution of the trespass issue. Receipts to this effect were immediately forwarded to the Babcocks.

[1] The record clearly establishes that appellant turned out his cattle onto the allotment on May 25, 1975, and that he had no license to do so until July 22, 1975. Appellant's cattle were free to graze on the Federal range and the inspection on July 9 demonstrates that they did so, despite appellant's placement of salt licks intended to keep the cattle on appellant's private land within the allotment. This evidence establishes a violation of a provision of the Federal Range Code, 43 CFR 4112.3-1, which provides in part as follows:

The following acts are prohibited on the Federal range: 1/

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

The violation of this regulation constitutes a trespass within the meaning of 43 CFR 9239.3-2. See Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976).

[2] Where the trespass was not clearly willful, the damages are to be computed at a rate of \$2 per AUM or the commercial rate, whichever is greater. 43 CFR 9239.3-2(c)(2). The Judge properly found that BLM had correctly computed the damages at \$4.50 per AUM which a range survey had shown as being the applicable commercial rate. An AUM is defined as "the amount of natural or cultivated feed necessary for the sustenance of one cow or its equivalent, for a period of one month." 43 CFR 4110.0-5(o). Thus, BLM properly concluded that 80 cattle consumed 150 AUM's in the allotment in a period of slightly less than 2 months. Because the forage on

1/ 43 CFR 4110.0-5(h) provides as follows:

"'Federal range' means land within established grazing districts administered by the Bureau of Land Management under the Federal Range Code for Grazing Districts (this part), including the vacant, unappropriated, and unreserved public land of the United States chiefly valuable for grazing and forage crops; State, county, and privately owned land leased for such administration; and lands so administered pursuant to a cooperative agreement with the Federal department or agency having jurisdiction over such land."

federal land constituted 33 percent of the total forage available to the cattle, it is reasonable to conclude that the cattle consumed 50 AUM's of forage on federal land and that the damages are properly computed by multiplying this figure by the commercial rate to obtain a total amount of \$225 in damages, for which the \$76 credit is to be subtracted, leaving \$149 due.

[3] Appellant raises many issues and objections to the assessment of these trespass damages. The Bureau of Land Management contends that his arguments are without merit or have not been framed adequately so as to require a response. As will be discussed, infra, we disagree with appellant's contentions and find that the assessment of the trespass damages is proper in this case. While the monetary amount in this case is small, the determination that trespass damages are owed to the United States has important consequences. For example, while no ruling has been made at this time to suspend, reduce or revoke appellant's license, permit, or base property qualifications as authorized by 43 CFR 9239.3-2(e)(2), such action may be taken in the future if the facts warrant it. See Eldon Brinkerhoff, supra. More significantly here, regulation 43 CFR 9239.3-2(d) provides, in effect, that grazing licenses or permits will not be issued or renewed until payment has been made of trespass damages. The Judge ruled that if there is a failure to make payment of the assessed damages, the District Manager is authorized to take such action as may be proper under the regulations. Since this decision on appeal is the final

administrative decision on the trespass damage assessment, we modify the Judge's decision to clarify that no further license or permit should be issued or renewed in this case until the trespass damages are paid.

Eldon L. Smith, 5 IBLA 330, 79 I.D. 149 (1972).

Furthermore, the issues raised by appellant go to the propriety of the administrative proceedings within this Department determining grazing trespass damages. They also go to other matters of wide and general applicability concerning trespass damages, evidence, contract Administrative and constitutional law.

[4] Appellant asserts generally that the decision is contrary to the evidence, the facts, the law, the Constitution of the United States and the Constitution of the State of Idaho. He argues that the Judge erred in not ruling on the issues of law he presented at the hearing. He argues that the Judge should have dismissed the Order to Show Cause which initiated the trespass proceeding. He claims that he should have received a jury trial. He contends that the decision "does not conform to the totality of the circumstances as they were presented therein," that the Government's evidence was insufficient to support the decision, and that the "decision is based on inference and/or assumption, unsupported by legal evidence, and as such, constituted a denial of due process."

In an additional statement of reasons, appellant expanded upon the above assertions and further contended that the Government did not meet its burden to "prove beyond a reasonable doubt that the defendant did in fact commit the crime as charged" and that facts do not support the charge. Noting that the procedures had been authorized under the Administrative Procedure Act, appellant attacks the constitutionality of that statute. He enumerates provisions of the Federal and Idaho Constitutions which he contends were violated by the decision, and cites the Judge for failure to follow these authorities over departmental regulations.

We shall first consider the burden of proof and evidence issues. Appellant contends that the record did not show beyond a reasonable doubt that there was a violation of the regulation as charged. Although a review of the record dispels any doubt that appellant violated the regulation, the Government did not have to prove beyond a reasonable doubt that the violation occurred. That standard for the burden of proof applies only in criminal proceedings, not in civil proceedings. Edwards v. Mazor Masterpieces, Inc., 295 F.2d 547 (D.C. Cir. 1961).

In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt.

5 U.S.C. § 556(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

[5] Appellant asserts that the evidence only shows that he turned 80 cattle out onto his privately owned land within the allotment, and that only 25 cattle were found on federal land on one particular day. He contends that we may not presume that the trespass has been continuous since the time when he turned his cattle out onto his private land until he obtained his license, and because the regulations purport to control what appellant may do on his private land, he asserts that they are unconstitutional.

Appellant's land is included in an allotment with federal land. Within the allotment, no physical barriers separate the private land from the federal land. In the absence of any effective restraint, appellant's cattle were free to graze throughout the allotment. In the absence of evidence to the contrary, as we indicated, it is therefore reasonable to conclude that of the total forage consumed by appellant's cattle, federal forage comprised the same percentage as it comprised of the total forage available in the allotment, i.e., 33 percent. This same presumption has been used to calculate damages in other grazing trespass cases involving allotments with mixed federal and private lands. See, e.g., Nick Chournos, A-29040 (November 6, 1962); J. Leonard Neal, 66 I.D. 215 (1959). This measure

of damages is applied to determine the value of the federal forage consumed, not the forage consumed on the private land within the allotment. We find that the Judge's decision is supported by substantial evidence of the trespass violation and damages. Furthermore, we see no merit to appellant's contentions that the regulations here are unconstitutional. Cf. Kleppe v. New Mexico, 426 U.S. 529 (1976); Camfield v. United States, 167 U.S. 518 (1897), and see discussion, infra.

[6] Some of the references cited by appellant indicate that it is appellant's view that the Department may not regulate the public lands because the Constitution assigns all legislative power to Congress and all judicial power to the Judiciary. Appellant would raise the separation of functions doctrine and the nondelegation doctrine as barriers to this Department's regulation of grazing and adjudication of this case. The nondelegation doctrine and separation of powers doctrine were only invoked to invalidate those delegations of power which were considered so broad as to be standardless. See, e.g., A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The doctrine has little, if any, vitality today. Recognizing the practical necessity for Congress to delegate the exercise of its authority, courts have ruled that to invalidate such delegations would be tantamount to a denial of Congress' own powers under the Constitution. See, e.g., Sunshine Anthracite Coal Co. v. Adkins, Collector of Internal Revenue, 310 U.S. 381, 395-96 (1940). See

generally, 1 K. Davis, Administrative Law, Chapter 2 (1958, Supp. 1970 & Supp. 1976). For similar reasons, the courts have rejected the argument that the administrative agencies unlawfully infringe on the judicial function. See, e.g., Sunshine Anthracite Coal Co. v. Adkins, Collector of Internal Revenue, supra at 393. See generally, 1 K. Davis, supra, § 1.09.

The above discussion has been directed to the validity of the regulatory and adjudicative powers of administrative agencies in general. Even when the issues discussed above were considered to have merit, the authority of the Department of the Interior over public land was firmly established and well recognized. Implicit in several court decisions is the recognition of the regulatory and judicial nature of this Department's authority. See, e.g., Cameron v. United States, 252 U.S. 450, 460 (1920); Knight v. U.S. Land Association, 142 U.S. 161, 181 (1891); Williams v. United States, 138 U.S. 514, 524 (1891); Lee v. Johnson, 116 U.S. 48 (1885). This Department's authority over public lands derives from a great number of statutes, many of which have been compiled in Titles 30 and 43 of the United States Code, and is rooted in the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, which provides as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." The Department may control grazing on

Federal land pursuant to appropriate statutory authority. Shannon v. United States, 160 F. 870 (9th Cir. 1908). See also Kleppe v. New Mexico, *supra*.

Pursuant to its authority under the Property Clause, Congress has enacted the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1970), which confers upon the Secretary of the Interior the authority to regulate grazing on public land. Pursuant to this statutory authority, the Secretary has published regulations, including the one which appellant has violated and the ones prescribing the procedures to be used in determining this case. Indeed, the Secretary has been authorized to enforce and to carry into execution every provision of the public land laws, 43 U.S.C. § 1201 (1970). This provision gives the Secretary the authority to define a trespass on public land and to take appropriate action to enforce the Department's regulations. The Supreme Court has noted this Department's authority to promulgate regulations under the Taylor Grazing Act. Brooks v. Dewar, 313 U.S. 354 (1941). The constitutionality of this authority is implicit in the decision.

[7] Appellant also asserts that the procedures violate his asserted right to a jury trial. The instant case is not a criminal proceeding, so the Sixth Amendment's requirement for a jury trial is not applicable. As we have explained above, the trespass in the instant case is defined by regulation, not by the common law, and

because the regulatory action was unknown at common law, the Seventh Amendment does not require the use of a jury in administrative proceedings. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, ___ U.S. ___, 97 S.Ct. 1261 (1977); United States v. Eugene Stevens, 14 IBLA 380, 387-388, 81 I.D. 83, 86 (1974), and authorities cited therein.

[8] With respect to other procedural due process issues raised concerning the hearing procedure followed here, we point out that the procedures followed here resemble mining claim contest proceedings which have been found to meet Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970), and constitutional due process requirements. See United States v. Stevens, supra at 14 IBLA 385-387, 81 I.D. 84-86, and authorities cited therein. Although appellant attacks the Administrative Procedure Act, the Act has not been regarded as an intrusion upon the powers of the judiciary. Indeed, courts have required agencies to follow the requirements of the Act not only when another statute requires an agency to make its decision on the basis of a record at a hearing, but also when such hearings are required as a matter of constitutional due process. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). It therefore follows that adherence to the requirements of the Administrative Procedure Act will usually satisfy the due process requirements of the Constitution. Because the Administrative Procedure Act, 5 U.S.C. § 554(d) (1970), prohibits employees engaged in investigative or prosecutory functions

from acting as examiners or Administrative Law Judges in factually related cases, the constitutional requirement of due process is not violated by the fact that the official who presides at the hearing is also an employee of the agency. Wong Yang Sung v. McGrath, *supra*; United States v. Stevens, *supra*. The Administrative Procedure Act conferred no new power upon federal agencies; it was designed to ensure fairness in administrative proceedings which were otherwise authorized, such as those in this case.

[9] As for appellant's contention that the decision is contrary to Idaho law including that State's trespass provision, we need only answer that under the Supremacy Clause of the United States Constitution, federal law necessarily overrides conflicting state laws with respect to federal public lands. U.S. Const., art. VI, cl. 2; Kleppe v. New Mexico, *supra* at 543. "A different rule would place the public domain of the United States completely at the mercy of state legislation." Camfield v. United States, *supra* at 526; *see also*, Utah Power & Light Co. v. United States, 243 U.S. 389, 404-405 (1917). The federal laws and regulations are the relevant body of law in this case.

[10] The final issue which warrants discussion concerns appellant's specific argument that the Bureau's acceptance of the check for \$155 constituted an accord and satisfaction with respect to the trespass damages. Neither the facts recited previously nor the law

warrants such a conclusion. There was no knowing acceptance of the amount in settlement of the trespass damages. The fact that the Bureau deposited a portion of that amount in a "suspense" account shows that the check was not accepted in settlement of trespass damages. Therefore the fact that the check was cashed does not constitute an accord and satisfaction, even though the check recited that it was in "payment in full for 1975 grazing fee." That recitation would not include trespass damages. Cf. 1 C.J.S., Accord and Satisfaction § 35 at 539 (1936); Edward Malz, 24 IBLA 251, 83 I.D. 106 (1976); see generally, United States v. Aetna Cas. & Sur. Co., 480 F.2d 1095 (8th Cir. 1973). Judge Morehouse's refusal to accept appellant's argument on this point was correct.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, as modified by our ordering that no further license or permit should be issued or renewed until the \$149 remaining trespass damage due is paid.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

